

1 UNITED STATES DISTRICT COURT

2 SOUTHERN DISTRICT OF OHIO

3 WESTERN DIVISION

4 - - -

5 ERIC L. JEFFRIES, : CIVIL ACTION 1:02cv351  
6 :  
7 Plaintiff, : Cincinnati, Ohio  
8 : Friday, October 8, 2004  
9 :  
10 -vs- :  
11 :  
12 CENTRE LIFE INSURANCE CO., : Conference in chambers  
13 et al., :  
14 :  
15 Defendant. : 9:00 a.m.

11 - - -

12 TRANSCRIPT OF PROCEEDINGS  
13 BEFORE THE HONORABLE SANDRA S. BECKWITH, CHIEF JUDGE

14 - - -

14 For the Plaintiff: Michael A. Roberts, Esq.  
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16 Fifth Third Center, Suite 1900  
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17 For the Defendant: William R. Ellis, Esq.  
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21 Law Clerk: Pat Smith  
22 Court Reporter: Betty Schwab  
23  
24  
25

1 PROCEEDINGS IN CHAMBERS

2 THE COURT: Well, I read what each of you have  
3 submitted. I looked at the highlighted portions of the  
4 proposed mutual settlement and general release agreement.  
5 Most of the highlighted portions and, in fact all, as I  
6 recall, have to do with the assumptive reinsurance  
7 agreement and the tax consequences and not with the  
8 confidentiality issue. Am I correct?

9 MR. ROBERTS: With the exception of what's  
10 highlighted at pages 12 and 13, or at least they should  
11 have been highlighted.

12 THE COURT: Oh, in green. Yes, yes. Sorry.

13 MR. ROBERTS: Which is all a section.

14 THE COURT: Basically that was all stricken. So  
15 that left the agreement with nothing regarding  
16 confidentiality. Am I right?

17 MR. ELLIS: Correct, Your Honor.

18 MR. ROBERTS: That's what the defendants'  
19 proposal is.

20 THE COURT: All right. Let me tell you what I  
21 understand the problems to be, and then you can fill in the  
22 blanks or correct me. We put a settlement on the record  
23 April 19th this year. As I recall, there was an agreement  
24 with regard to the tax consequences that Mr. Roberts could  
25 work directly with Mr. Cohen to attempt to avoid the

1 payment of taxes on the income generated by the two million  
2 dollar settlement, and they reached an agreement regarding  
3 the assumptive reinsurance situation. Apparently, there is  
4 a fair amount of discussion between Mr. Cohen and  
5 Mr. Roberts, and perhaps Mr. Ellis as well, off the record  
6 outside the presence of the Court on the particulars of how  
7 that agreement was going to work.

8 MR. ROBERTS: Time frame? Prior to?

9 THE COURT: It was not entirely clear to me, but  
10 it seems there was discussion of that.

11 MR. ROBERTS: Yes.

12 THE COURT: Privately, not in the course of our  
13 settlement discussions.

14 MR. ROBERTS: Both before and after, right.

15 MR. ELLIS: I may be able to save the Court some  
16 time on this, Your Honor, with regard to the tax issues. I  
17 spoke with Mr. Cohen yesterday. He, as Mike had suggested,  
18 spoke directly with the financial advisor that has been  
19 employed, and they are of one mind, and she is currently  
20 working it out. As a matter of fact, he was waiting to  
21 hear from her today or soon on some language, because they  
22 now understand what we can and cannot do with regard to the  
23 agreement.

24 The problem wasn't the attempt to assist the  
25 Jeffries in having it tax free. The problem was that the

1 language that was used was stating things that DMS could  
2 not state with any kind of certainty whatsoever. And  
3 Mr. Cohen and the financial advisor, according to what he  
4 told me just yesterday, have come to the conclusion that  
5 there is language that is acceptable to both parties that  
6 will resolve the problem. So I don't think the tax issue  
7 is a major problem.

8 MR. ROBERTS: I don't know that Bill's correct.  
9 I did get an e-mail from my expert, who is now dialoguing  
10 with Mr. Cohen, and the e-mail to me said that she had  
11 spoken to him and she is going to come back with a  
12 proposal. So, whether there is one mind or agreement on  
13 the tax language, I hope we're there, but right now we're  
14 still in the proposal stage. But, like I said, I'm hopeful  
15 that the subject that those two discussed will result in  
16 that issue being resolved. And perhaps we just reserve  
17 that in the event it's not.

18 MR. ELLIS: I believe that one is going to be  
19 taken care of.

20 THE COURT: Okay. Well, it was concerning to me  
21 that, at some point, I think it was Mr. Ellis that said  
22 please don't contact Mr. Cohen directly any longer; deal  
23 with me. And I thought that probably is not a practical  
24 solution to the problem, because it seemed to me that most  
25 of the language that was stricken, and maybe I'm

1 misinterpreting, was stricken by Mr. Cohen, and, if you  
2 couldn't contact him directly to ask him the reasons for  
3 doing that, you couldn't very easily work out the problem.

4 MR. ROBERTS: You know, there was a reference in  
5 Mr. Ellis' letter to you last week, Your Honor, that  
6 suggested perhaps I had spoken to Mr. Cohen without the  
7 authority to do so and improperly. That never occurred. I  
8 was invited to speak to him before our trial on Sunday  
9 evening. I did so. I was invited to speak with him post  
10 trial in settlement. I did so. I had phone calls with  
11 him. I had e-mail conversations with him. The voice mail  
12 message he left for me, I believe, is in my declaration. I  
13 want to be clear that there is not the suggestion I spoke  
14 to him without the authority to do so.

15 THE COURT: My understanding was that there may  
16 have been some change of heart about whether you should be  
17 in contact with him directly, and it didn't seem to me that  
18 that was going to help us out very much.

19 Do I understand that direct contact is not a  
20 problem?

21 MR. ELLIS: The direct contact between counsel  
22 and Mr. Cohen I don't think is a problem. Mr. Cohen  
23 requested that the rest of the language be worked out  
24 between the two of us. He had said this is what I cannot  
25 do. Then Mike and I talked, and we agreed that the

1 simplest way to do this was to have the financial advisor  
2 who was telling Mike, who was then putting language in, to  
3 talk directly with Mr. Cohen, who was taking language out  
4 and telling me. So we just cut out the middleman and let  
5 the two of them work it out.

6 MR. ROBERTS: So Mr. Cohen is involved, but with  
7 a different representative from Mr. Jeffries.

8 THE COURT: Well, there is always the potential,  
9 when you have too many people passing on messages -- it's  
10 like the old party game -- that the message ends up  
11 garbled.

12 MR. ELLIS: We now have it worked out.

13 THE COURT: Okay. So resolution of the  
14 tax-related language in the settlement is in progress, in  
15 process?

16 MR. ELLIS: Hopefully.

17 THE COURT: Okay. Then the other remaining issue  
18 is the confidentiality situation.

19 MR. ROBERTS: I would say yes, but, depending on  
20 where that comes out, there might be an issue with regard  
21 to the release, Your Honor.

22 THE COURT: Well, can we talk about -- should we  
23 talk about them separately, or are they so interrelated  
24 that we can't separate them?

25 MR. ELLIS: I don't know what the other issue is

1 with regard to the release.

2 THE COURT: I don't either.

3 MR. ROBERTS: I think that, if we deal with the  
4 confidentiality issue first, that that may or may not take  
5 care of the release.

6 THE COURT: As I understand what Plaintiff's  
7 position is, and Plaintiff has submitted information that  
8 seems to support his position, that the terms of the  
9 confidentiality provision to be included in the settlement  
10 agreement was reserved to the plaintiff.

11 MR. ROBERTS: It was. And if I could highlight  
12 exactly how we got to that position again, there were  
13 settlement discussions that were conducted with the Court's  
14 assistance during the week or ten days prior to the  
15 scheduled trial date of April 19th, and they weren't  
16 successful. But on Sunday, April 18th, at 8:30 in the  
17 evening I was invited to call Mr. Cohen. And he and I  
18 spoke, and we resolved -- I thought we had resolved an  
19 issue about tax ability that was concerning to  
20 Mr. Jeffries.

21 We also discussed confidence, and we agreed that  
22 it would be at Mr. Jeffries' election if we settled, but we  
23 hadn't settled that evening. The next day, we proceeded to  
24 trial, and, in the course of the proceedings the next day,  
25 during the lunch hour the parties did reach an agreement.

1 And when we articulated our agreement to the Court, we  
2 returned to the Court at about 2 p.m., and the transcript  
3 of that afternoon began with the Court asking that, on  
4 behalf of the plaintiff, I recite what the settlement terms  
5 were.

6 And at page two of the transcript from that day,  
7 I say: Thank you, Your Honor. Prior to the trial, the  
8 defendant offered to pay to the plaintiff two million in  
9 exchange for return of the disability policy, the return of  
10 confidential documents, and left to the plaintiff an  
11 election on confidentiality provisions relating to the case  
12 and the settlement.

13 And there are further terms that go on, but then  
14 at page four the Court invited Defendants' counsel,  
15 Mr. Ellis, to state whether I had accurately reflected the  
16 terms. And Mr. Ellis says: Your Honor, the offer that was  
17 made accurately stated, to the extent I thought we were  
18 asked, to provide half up front. And he talks about  
19 payment of cash. But nonetheless, he affirms that I  
20 accurately represented that the parties' agreement was that  
21 confidence is at Mr. Jeffries' election.

22 The Court then, somewhat perhaps quizzical as to  
23 the confidentiality provision, at page six says, quote:  
24 And the confidentiality is at the option of the plaintiff;  
25 is that correct? And I respond yes. And Mr. Ellis'



1 response was, quote: It's not an issue for us, Your Honor.

2 There were several other references to  
3 confidentiality throughout the transcript that I have  
4 highlighted that I provided to the Court. At the bottom of  
5 page six and top of page seven, Mr. Ellis says, quote: It  
6 makes no difference to us. We will, of course, ask for the  
7 information Mr. Roberts found concerning it be sealed, the  
8 same with Mr. Jeffries. No problem.

9 Later I, through Mary Brown, the Court's  
10 assistant, asked that the case be sealed, and Mr. Ellis  
11 objected to that. So, as of today, the record 02-351 is  
12 not sealed. All the documents remain public record.

13 Later in the course of that hearing at page 22,  
14 Mr. Ellis said, line 23: I think what we can do is this:  
15 Today we will agree to confidentiality of all materials  
16 related to Mr. Jeffries' claim, and it will not be  
17 surrendered without an order of the Court. And Mr. Roberts  
18 will receive notice if anyone suggests they're going to  
19 seek it by subpoena or court order, and we will leave it at  
20 that today.

21 I have not received any communication from  
22 Mr. Ellis that anyone has sought that information from his  
23 office or his client, and I have not been advised by  
24 Mr. Ellis that they've willingly given any information to  
25 anyone, but we suspect perhaps an inquiry on that line is

1 appropriate.

2 At line 25 or -- excuse me -- page 25, line 13 of  
3 that transcript from April 19th, Mr. Ellis says: I don't  
4 know what the concern is of the plaintiff, but I will  
5 guarantee you this stuff is not going anywhere. So we had  
6 Mr. Ellis' guarantee on behalf of the plaintiff as of April  
7 19th that, from that moment forward, they were to keep it  
8 confidential.

9 The issue that now arises is Defendant says they  
10 never suspected that Mr. Jeffries' election on  
11 confidentiality could have been unilateral. They said that  
12 was not within the concept of what he perceived  
13 Mr. Jeffries' election to be. Well, that's not material.  
14 It's like discretion. What they agreed to do, what they  
15 said was not an issue for them, was to leave confidence at  
16 Mr. Jeffries' election. He could elect that it be mutual.  
17 He could elect that it be unilateral. He could elect that  
18 it be complete. He could elect that it be partial. He  
19 could elect that it apply on Tuesdays if he wanted to and  
20 not on Wednesdays. It was his election in his sole  
21 discretion to decide what he wanted in the way of  
22 confidence, and that understanding is patent from how the  
23 proceeding concluded.

24 The proceeding concluded at page 35 with juror  
25 number one asking the Court: May we hear the settlement

1 terms? The Court's response was at page 35: Mr. Roberts,  
2 how does your client feel about it? And I said my client  
3 would allow the jury to know. What does that say?  
4 Mr. Ellis was in the courtroom. The Court did not ask  
5 Mr. Ellis for his consent. It was obvious to the Court and  
6 obvious by Mr. Ellis' failure to object that it was for  
7 Mr. Jeffries to decide which, if any, third parties could  
8 know of the settlement terms. The jurors were third  
9 parties. The Court said: Mr. Jeffries, can they know or  
10 can they not know? It's up to you. It's his election.  
11 That was the understanding. These are third parties that  
12 came to know the terms of the settlement only because  
13 Mr. Jeffries desired that they know. It wasn't a mutual  
14 consent. It was completely up to him.

15           Articulating the terms of the settlement to the  
16 jury did not prevent Mr. Jeffries from asking for  
17 confidence from anyone at any point in time. It was his  
18 election. He decided that they could know. He can also  
19 decide that other people can or can't know. It was his  
20 election. They didn't object.

21           What transpired after we left that day was drafts  
22 of the settlement agreements were exchanged. I proposed a  
23 settlement agreement that said Mr. Jeffries is going to  
24 keep it confidential to the extent he desires, but he  
25 requires that the defendants and all their agents and the

1 lawyers keep it confidential. And the defendant says  
2 they're not going to agree to that now.

3 It's exactly in contradiction with what happened  
4 on April 19th, what they committed to on April 19th.  
5 What's obvious from expressing the settlement terms to the  
6 third-party jury was that it was Mr. Jeffries' decision and  
7 his decision alone, and Defendants would just have to live  
8 with it. And if Mr. Jeffries requires that they keep it  
9 confidential, that's what they have to live with. That's  
10 what they agreed to.

11 That was the term that was promised in exchange  
12 for releasing the jury, and now they won't agree to it.  
13 Mr. Ellis will say: Well, Mr. Roberts, not Mr. Jeffries,  
14 Mr. Roberts breached the confidentiality agreement because  
15 he provided information about the Jeffries case to another  
16 client, Mr. Kearney.

17 I don't know if the Court is aware, but I also  
18 represent another individual who's been sued by DMS. DMS  
19 is third-party administrator for another insurance company  
20 called Jefferson Pilot. There wasn't a lot of discovery in  
21 that case before Jeffries concluded, but I had been  
22 retained by that individual before Jeffries concluded.  
23 During the process of representing that individual, I  
24 shared information that I came to know about DMS.  
25 Subsequent to April 19th, I've continued to discuss with

1 that individual information about DMS. I have not revealed  
2 to that individual anything confidential.

3 The Court may or may not be mindful, but in the  
4 Jeffries case, which was initiated in May of 2002, there  
5 was no suggestion of a protective order until March of  
6 2004, almost two years. And the protective order was very  
7 discreet. It applied to personnel files and other  
8 information that had to be marked "confidential." Nobody  
9 has seen those confidential materials. Those were all  
10 returned to Mr. Ellis. Mr. Kearney has not seen those.  
11 They have not been provided.

12 But, nonetheless, it's a nonissue because, if Mr.  
13 Jeffries decides that Mr. Kearney can know about his case,  
14 it's his election, just like the jury. Mr. Kearney is no  
15 different than the jury. He's a third party that  
16 Mr. Jeffries could choose to share that information with.

17 Mr. Ellis makes a representation in his letter of  
18 September 30th that some lawyer in Arizona has gotten  
19 information about the Jeffries case. That's true. I  
20 contacted that lawyer after Mr. Ellis made that  
21 representation. His name is Charles Surano. And I sent  
22 him an e-mail, and I talked to him on the phone. I said,  
23 what have you learned. Apparently, Mr. Kearney has sent  
24 that lawyer, Charles Surano, some deposition transcripts.

25 I have, if the Court desires to review it, an

1 e-mail from Cathy Smith, who is Mr. Surano's assistant.  
2 Mr. Surano, because the procedure rules in Arizona require  
3 it, disclosed to DMS in a case called Phillips v. Mass  
4 Casualty Insurance Company, the same defendant as here,  
5 disclosed the sixth supplemental disclosure of the  
6 plaintiff in June of 2004. And in that disclosure on  
7 behalf of Mr. Phillips, Attorney Surano reveals that he's  
8 gotten some depositions from a lawyer in a case called  
9 Gralnek v. Mass Casualty, a case called Perry v. Mass  
10 Casualty, a case called Novak v. Mass Casualty and a case  
11 called Odom v. Mass Casualty. This lawyer in Arizona has  
12 gone to great lengths to speak to lawyers who have gone up  
13 against DMS and Mass Casualty, including speaking  
14 apparently to Mr. Kearney.

15 According to this disclosure, Mr. Kearney or  
16 someone other than me provided this lawyer with the  
17 deposition transcripts of John Graff, Andy Cohen and Jeff  
18 Champagne. Those deposition transcripts were filed in the  
19 public record in this case. The depositions in whole and  
20 many parts of them were cited in briefs and attached as  
21 attachments to the briefs.

22 There is nothing confidential, nothing  
23 confidential, about those deposition transcripts. They're  
24 not subject to any stipulated protective order. They're  
25 not marked confidential according to my protective order.

1 They are part of the public record. There is no breach of  
2 any confidence because some lawyer in Arizona, who is doing  
3 his job contacting plaintiffs throughout the country, comes  
4 up with this public record of a deposition transcript. You  
5 don't even get there, because it doesn't matter. It was  
6 Mr. Jeffries' election about who could and who couldn't  
7 learn information about his case.

8 Maybe even more important than that is in May of  
9 this year I made efforts through the Court's assistant Mary  
10 Brown to have the record sealed, and Mr. Ellis objected.  
11 So that record remains public because Mr. Ellis objected to  
12 having it sealed. So it's a public record. There is --

13 I submit, Your Honor, it is not logical, because,  
14 within the past couple weeks, I have told Mr. Ellis: Hey,  
15 you know, if you want to talk about a confidentiality  
16 arrangement, we could possibly, you and I, talk about  
17 something that could be mutual that would meet whatever  
18 your client's interests are. He flatly rejected my offer  
19 to speak, and he did that because, he says, "you breached  
20 it."

21 Well, I haven't breached it, and it doesn't make  
22 sense to me that, if I offer to get together and enter some  
23 mutual confidential arrangement, that they wouldn't take me  
24 up on that, unless the only thing I can come up with to  
25 explain the position that they present to you today, Your

1 Honor, the only thing I can come up with is that they  
2 haven't kept it confidential. And if they haven't kept it  
3 confidential, that would explain why it is they don't want  
4 to be bound by any confidential right now. That is what  
5 makes the release an issue, because they guaranteed, his  
6 own word, "guarantee you we'll keep it confidential" on  
7 April 19th.

8 If he hasn't kept it or his clients haven't kept  
9 it confidential since April 19th, then there is a real  
10 concern about a legal claim. Mr. Jeffries and I have  
11 reason to believe that a third party has come to know  
12 information about the case through Mr. Ellis or his clients  
13 that may be causing Mr. Jeffries damage, any claim that may  
14 exist presently for a breach of that guarantee.

15 I would ask that the Court inquire of Mr. Ellis  
16 about what disclosures he's made since April 19th.

17 THE COURT: Mr. Ellis?

18 MR. ELLIS: Your Honor, I don't think it was ever  
19 contemplated that the confidentiality that we left to  
20 plaintiffs' election could be partial, selective or  
21 unilateral. None of those makes any sense for my clients,  
22 obviously. The concern that we have for the unilateral  
23 confidentiality is very simple. As Mr. Roberts has  
24 evidenced in depositions in Mr. Kearney's case, he will use  
25 the information in the Jeffries case offensively, spin it



1 how he will in his prosecution of other cases. He's also,  
2 or someone has, through Mr. Roberts, disseminated this  
3 information to other plaintiffs' lawyers around the  
4 country. So we're going to be faced with the information  
5 that was developed in the Jeffries case and the outcome of  
6 the Jeffries case and so forth with the spin of the  
7 particular plaintiff's attorney who has it.

8 Under the confidentiality agreement as proposed  
9 unilaterally, Plaintiffs can spin it and do whatever they  
10 wish with it, and our only response can be it's  
11 confidential. If we do that, then the Courts involved in  
12 those cases get a significant misimpression about what  
13 happened here, and they get a significant misimpression  
14 about what DMS or its other insurers, insurers for whom it  
15 works, can say what has happened in the past.

16 We had the experience in the transcripts in the  
17 Kearney case. I brought for you some examples of what kind  
18 of things we're dealing with. It's true we agreed not to  
19 seal or we objected to sealing the case, which was, by the  
20 way, just days before this deposition that that motion was  
21 made, saying we would be glad to seal it once we had the  
22 agreement completed and the confidentiality worked out.  
23 The Court agreed with us on that and did not seal the case  
24 for that purpose.

25 If you look at the first deposition transcript,

1 Exhibit 1 or page 100 and 101, which was the deposition of  
2 Valerie Loftin, it's the second and third page that I have  
3 given you, Mr. Roberts in his question is asking her if  
4 she's mindful of a jury in Ohio concluding that DMS acted  
5 in bad faith.

6 Well, now, if we can't respond and say that was a  
7 summary jury trial and actually it was settlement technique  
8 as opposed to an actual trial, and we can only say it's  
9 confidential, there is no dispute that what Mr. Roberts  
10 couches as a jury verdict was, in fact, the case.

11 In Todd Ditmar's deposition, page 16 and 17, we  
12 had the same situation where he refers to a jury  
13 determination in Hamilton County that DMS has acted in bad  
14 faith. Further, on page eight, he discloses the jury  
15 verdict -- I'm sorry -- page eight in a discussion with me,  
16 he refers to the jury verdict of bad faith again and to the  
17 settlement itself.

18 THE COURT: Are you talking about the Ditmar  
19 deposition?

20 MR. ELLIS: Yes. This is Mr. Ditmar at page  
21 eight and nine. Page six, which probably should have  
22 preceded those, is my objection to Mr. Roberts' use of  
23 material from the Jeffries case. He told me he had already  
24 given it to Mr. Kearney and therefore it's a public  
25 document, and so he's not bound by it, although it was he

1 using it in the deposition.

2 Page 65, he marked Exhibit 30. Exhibit 30  
3 contained documents from the Jeffries case, specifically  
4 personnel records identified as DMS 47, 48 and 49 from the  
5 Jeffries case. If the Court will skip back just a few  
6 pages, you will see that a motion was made to seal what was  
7 then called Exhibit 3, which was DMS pages 47 to 53,  
8 including the pages that were used in this deposition.

9 MR. ROBERTS: Where are you reading from?

10 MR. ELLIS: There would be a motion to seal  
11 Exhibit 3, which is a couple -- which is at the end of the  
12 transcripts. That generated a Court order which  
13 immediately follows in which Judge Hogan, under the heading  
14 "Defendants' Motion to Seal Exhibit 3," said Defendants'  
15 motion placing Exhibit 3 under seal is unopposed and hereby  
16 granted. The exhibit contains information from the  
17 personnel file of one of the defendant's employees. The  
18 Court finds such information to be protected from public  
19 query and Plaintiff's failure to take issue with this fact  
20 is sensible.

21 Further, two pages later in that order on  
22 follow-up performance evaluations, the Court says that the  
23 only way to get to the truth is to order the disclosure of  
24 redacted -- of the redacted material made in these cases  
25 and that that would be subject to a protective order, which

1 is what the Court said. Further on the next page, the next  
2 order stipulated protected order pursuant to Magistrate  
3 Hogan's March 23rd order, item two, this order applies to  
4 the financial information referenced in March 3, '04 order,  
5 the administrative services agreement and previously  
6 redacted performance evaluations, all of which Mr. Roberts  
7 used in the Kearney case.

8 My client has no belief at this point that there  
9 ever was an intention on the part of Mr. Jeffries or his  
10 counsel to keep anything confidential, and we know that it  
11 has spread around the country already.

12 Mutual confidentiality makes no sense to anybody.  
13 It was never contemplated by me. It was never  
14 contemplated, and, if we did not have a meeting of the  
15 minds, we did not have a meeting of the minds, and then  
16 Mr. Jeffries would have the option of saying we did not  
17 settle the case, at which case we can put it back on the  
18 trial calendar.

19 My client can't take the untenable position of  
20 not being able to respond to the information from the  
21 Jeffries case being spun whichever way Mr. Roberts or some  
22 other plaintiff's attorney wishes to spin it without being  
23 able to respond to it other than saying it's confidential.  
24 There was no mention in that entire transcript before the  
25 court settlement of unilateral confidentiality. That word

1 doesn't appear anywhere in the transcript, and I have read  
2 it four times.

3 In fact, if the Court looks at that transcript,  
4 and specifically at pages six and seven, which was  
5 partially suggested by counsel, it's apparent that, when he  
6 asked that all of the information in the case be sealed,  
7 that I was saying it makes no difference to us of course,  
8 expecting that all of the information that he has would  
9 also be sealed. It showed that I asked for it to be  
10 mutual. Likewise, throughout, I have said I would keep it  
11 confidential, and we were assuming at the time that that  
12 was a request for mutual confidentiality.

13 The only one who was raising the issue of keeping  
14 it confidential was Mr. Roberts, but I never believed for a  
15 moment that he expected my client to sit dumbly by while he  
16 spreads information around the country to other plaintiff's  
17 lawyers and then gags our ability to respond to it. So we  
18 can't agree with unilateral confidentiality.

19 His offer to now make the confidentiality mutual  
20 has the same effect as unilateral, because the information  
21 has already been spread by Mr. Roberts and his other  
22 clients to various and sundry people around the country.  
23 So there is no advantage; in fact, there is a significant  
24 disadvantage to gagging my client in its response to the  
25 way this information is being used in other cases. And

1 that's our concern with regard to confidentiality.

2 MR. ROBERTS: Your Honor, may I have a brief  
3 reply?

4 THE COURT: Um-um.

5 MR. ROBERTS: Mr. Ellis' 90-second overview of  
6 what he suggests was improper disclosures by me in Kearney  
7 depositions is baseless. Following those depositions -- we  
8 were here before you at the trial on April 19th. Those  
9 depositions occurred May 14th. Following those  
10 depositions, in June of this year Mr. Ellis filed a motion  
11 with Magistrate Judge Hogan, who happens to be the  
12 magistrate on the Kearney case; he was the magistrate on  
13 this case. Judge Hogan was very mindful of the discovery  
14 issues in the Jeffries case. Mr. Ellis filed a motion  
15 asking that Judge Hogan or Judge Spiegel sanction me  
16 personally for having breached some confidentiality  
17 arrangement in the Jeffries case by using this same  
18 information that he's highlighted to you. Judge Hogan  
19 resolved that motion by finding that Mr. Ellis' allegations  
20 were, quote, baseless, and he sanctioned Mr. Ellis for even  
21 suggesting that what I did in Kearney violated anything  
22 that was protected in Jeffries.

23 So I could respond in detail to defend what he  
24 asserts as improper conduct in Kearney. It's baseless. It  
25 essentially comes down to this. Like I said, there was no

1 suggestion of a protective order of confidentiality in  
2 Jeffries until March of 2004. Months prior to that, I had  
3 been retained by Kearney, and I was providing Kearney with  
4 nonprotected information. In August of 2003, eight months  
5 before there was any suggestion of confidentiality, in  
6 August of 2003 I received a letter from Mr. Ellis, which is  
7 Exhibit 31 in the Jeffries -- in the Kearney transcript.  
8 He referenced Exhibit 30. Exhibit 31 is his cover letter  
9 to me from August of 2003 saying: Mike, enclosed please  
10 find the personnel files that are Bates labled 01 through  
11 0100. There was no suggestion of confidence in the cover  
12 letter. There was no suggestion of confidence or  
13 protective order prior to the cover letter. There was no  
14 statement of confidence on these documents. Those  
15 unprotected documents are what I used in Kearney.

16 The allegation, as Judge Hogan has already --  
17 he's read motions on it; he's read the set of exhibits;  
18 he's gotten more than that 60-second snippet from  
19 Mr. Ellis. He concluded that what Mr. Ellis is arguing is,  
20 quote, baseless. It's document number 76 in case number  
21 02-479.

22 MR. ELLIS: To my knowledge, I have not been  
23 sanctioned for filing any frivolous motion. Also to my  
24 knowledge, at Mr. Roberts' request, his counsel and my  
25 counsel spoke with Judge Beckwith -- I'm sorry -- with

1 Magistrate Judge Hogan concerning the issues that were  
2 raised in that. I had offered and continue to offer to  
3 have that entire record reviewed by an independent member  
4 of either the judiciary or the ethics committee to  
5 determine whether or not things broke. My understanding  
6 also is that, at Mr. Roberts' request, that particular  
7 order has been stricken or is to be stricken.

8 THE COURT: Document number 76?

9 MR. ELLIS: Document 76.

10 MR. ROBERTS: It was a recommendation that  
11 Mr. Ellis and I each be sanctioned, and Judge Hogan has  
12 stated that he intends to withdraw that, but he hasn't.

13 But my point is the same. I mean, that doesn't  
14 affect the point. My point is Mr. Ellis made this argument  
15 to Judge Hogan, who reviewed it and said, Bill, that's  
16 baseless, and I'm going to sanction you for even suggesting  
17 it. That's the point.

18 Has Mr. Ellis been sanctioned as we sit here  
19 today? No. Judge Hogan was persuaded that, largely  
20 because of efforts I made to smooth the waters with  
21 Mr. Ellis, that it should be stricken, and he hasn't to  
22 date, but my understanding is he intends to. I hope he  
23 does.

24 MR. ELLIS: Regardless, Your Honor, I don't know  
25 how the Court can ignore the specific sealing of the



1 specific exhibit that was used in the deposition still  
2 bearing the same Bates numbers identified in the motion  
3 sealed by the Court.

4 I don't want to get into the issues that we had  
5 in front of Judge Hogan. I can only tell the Court that,  
6 with regard to confidentiality, the fact that information  
7 from the Jeffries case has spread throughout the country  
8 and among plaintiffs' lawyers and is being used  
9 aggressively by them and by Mr. Roberts in other cases  
10 offers no basis or no reason for us to even consider  
11 maintaining any confidentiality. If we are going to have  
12 to respond, we're going to respond in full to these various  
13 allegations so that other courts don't get a misimpression  
14 about what occurred in the Jeffries case.

15 MR. ROBERTS: But it's a public record. As we  
16 sit here today, it's as public as today's Cincinnati  
17 Enquirer --

18 MR. ELLIS: And it will stay there.

19 MR. ROBERTS: -- because I asked that the 02-351  
20 record be sealed and Mr. Ellis refused to consent to that.  
21 So the three depositions that are now in the possession of  
22 some lawyer in Arizona are as public as any document that  
23 exists.

24 THE COURT: All right. I buy that. As far as  
25 I'm concerned, the only issue in play now is personnel

1 records that were used in the deposition in the Kearney  
2 case that were under seal, as I understand it.

3 MR. ROBERTS: That's not the case. There was one  
4 personnel file that was asked to be put under seal in the  
5 Jeffries case, and it was. It is under seal apparently in  
6 the Jeffries case.

7 THE COURT: And it was not used in any other  
8 deposition?

9 MR. ROBERTS: It was used in Kearney.

10 THE COURT: Okay.

11 MR. ROBERTS: I mean, it was under seal in the  
12 Jeffries case, and Judge Hogan drew a line there. There  
13 was no overriding protective order that that couldn't be  
14 used. It was placed under seal in the Jeffries case. It  
15 and the other personnel files that were never marked  
16 confidential, were never subject to a protective order,  
17 were used in Kearney.

18 I have offered, and this is what I offered as  
19 soon as Mr. Ellis objected, when he called Judge Hogan  
20 during the middle of the deposition, I said, Judge, I'm  
21 happy to redact any names, any identifying information from  
22 these as exhibits to this deposition transcript.

23 When I offered them as a deposition exhibit, I  
24 didn't think there was a problem, because I had had them  
25 for eight months. I had shared them with Mr. Kearney

1 months before there was any request that they be held  
2 confidential or put under seal. Months. They were in my  
3 possession and I shared them with my client. When I  
4 offered them in the deposition, a phone call was made to  
5 Judge Hogan five minutes later. I said, Judge, we will  
6 redact any identifying information from these.

7 That issue has been briefed extensively, and  
8 Judge Hogan's conclusion, which I agree with, is that the  
9 allegation I did anything improper is baseless.

10 THE COURT: Those items are now under a  
11 protective order or under seal in the Kearney case?

12 MR. ELLIS: No. We requested that the Court --  
13 let me think about that. I don't remember whether we  
14 requested the Court strike them or put them under seal or  
15 not, because, frankly, they're out in the public, and  
16 plaintiffs' lawyers around the country have been given  
17 them.

18 MR. ROBERTS: I have not given them to anybody.

19 THE COURT: I thought you had indicated that you  
20 had filed a motion subsequent to the depo.

21 MR. ELLIS: We had, Your Honor.

22 THE COURT: Motion to place Exhibit 3 under seal.

23 MR. ELLIS: That was in the Jeffries case, Your  
24 Honor. That's this one. That was the one that resulted in  
25 an order sealing it before it was used. Also, there is a

1 second order which refers to the previously redacted  
2 personnel records, because, as Judge Hogan said, personnel  
3 records are not to be put out in the public.

4 They are out in the public, and they're being  
5 used by Mr. Roberts, and I expect we'll see them in other  
6 cases as well.

7 MR. ROBERTS: So the record is clear, the  
8 previously redacted -- the reason why I got two sets of  
9 personnel files is because one was so redacted that it  
10 didn't make such sense. So I went to the Court and said,  
11 Judge, I got some redacted personnel files. There was no  
12 agreement about what could be redacted. There was no  
13 statement about what would be redacted. I don't know  
14 what's been redacted. I need them produced again. And  
15 Mr. Ellis went to the Court and said, well, I will produce  
16 them again in unredacted form, but those unredacted forms  
17 need to be subject to protective order. And they were. It  
18 was the unredacted personnel files that were subject to the  
19 protective order. The redacted ones, which I had for eight  
20 months without any request for confidence and which I  
21 shared with my other client, were never subject to any  
22 protective order.

23 THE COURT: Okay. Seems to me the fair and  
24 simple solution is that the settlement agreement should  
25 contain the language proposed by the plaintiff with

1 additional language that would permit the Court to allow  
2 the disclosure of otherwise confidential information in  
3 response to information that the plaintiff's counsel might  
4 use in other cases.

5 If you choose to open the door, then defense  
6 should be allowed, or it's actually the reverse in the  
7 other case right now, should be able to respond with any  
8 information that would otherwise be confidential. And it  
9 would have to be done in good faith of course.

10 MR. ROBERTS: I think that concept is already  
11 within the agreement. I mean, their obligation of  
12 confidence is absolutely absolute absent process, subpoena,  
13 something like that, as every confidentiality agreement  
14 contains.

15 So, you know, I meant to say this earlier, but  
16 Bill's major argument is, gee, Mike Roberts and his client  
17 and other plaintiffs around the country can talk about the  
18 Jeffries case and we have to stay mum. That's not true,  
19 because process can open the door for Defendant to say, and  
20 that's contained in the agreement. So that concern really  
21 is hollow.

22 But so it's consistent with what you're saying,  
23 but I suggest it's already contemplated.

24 The problem exists, Your Honor, because there is,  
25 I believe, a third party out there that's not issued any

1 subpoena to Mr. Ellis or his clients who, I believe, has  
2 been educated by Mr. Ellis or his clients since April.

3 THE COURT: Mr. Ellis, has any of the information  
4 that you said you would hold confidential been shared with  
5 third parties?

6 MR. ELLIS: No ma'am, not a single document.

7 MR. ROBERTS: What about just conversations?

8 MR. ELLIS: Not a single word about the  
9 settlement, its amount, other than that there was a  
10 confidential settlement, and that was in response to a call  
11 from Prudential's counsel who told me that Mike Roberts had  
12 called him and said he had some significant success against  
13 us. And he wanted to know the details, and I didn't give  
14 them to him. So Mr. Roberts had spoken with him and  
15 prompted his phone call to me. I have not provided him  
16 with anything, nor have I received a subpoena from him.

17 However, Your Honor, in keeping that good faith  
18 from April 19th, we were unaware and remained unaware,  
19 until the use of the materials in the Kearney case, that  
20 Mr. Roberts had an unspoken idea of unilateral  
21 confidentiality to which DMS cannot and will not agree. If  
22 there was not a meeting of the minds in the settlement  
23 agreement, so be it. If that is a deal breaker and we have  
24 to try this case, so be it.

25 As to the language that's provided by Mr. Roberts

1 in his desired confidentiality agreement, if the Court  
2 reads it, it requires me to surrender my litigation file to  
3 him. That I will not do without this Court's order and an  
4 appeal from this Court's order, because that is my  
5 litigation file. It is attorney-client privileged, and I  
6 will not turn it over to Mr. Roberts willingly.

7 It also requires experts in our case to sign off  
8 on a settlement agreement while requiring no one on his  
9 side to do the same. It also requires that all files and  
10 all materials developed either in litigation with experts  
11 or at DMS be turned over to Mr. Roberts, with the exception  
12 of one copy of what DMS deems is appropriate, which is  
13 basically all they keep anyway. But I'm not turning over  
14 all of the exhibits and everything else or all of the  
15 documents and all my communication, electronic and  
16 otherwise, with my client to Mr. Roberts, nor is my client  
17 going to turn over to Mr. Roberts just because it happens  
18 to mention Jeffries. So we're just not willing to do what  
19 Mr. Roberts demands and suggests that we somehow agreed to.

20 If the Court looks at the transcript, you will  
21 see that I said: I don't know what, if anything, I can  
22 give him until I hear from Mr. Cohen. Mr. Cohen has  
23 refused the suggestion that we surrender the videotapes.  
24 He said he will not gut a claims file that could be  
25 reviewed by a third party, and that's his ruling on it. I

1 said at the very beginning I didn't know the answer to the  
2 question. I think my exact words were I would have to get  
3 authority from on high to agree to provide Mr. Jeffries  
4 with all this material. I got the opposite answer.

5 So we can't do what Mr. Roberts has demanded to  
6 do, and we have no real desire to enter into a unilateral  
7 confidentiality agreement by which material is spread and  
8 has been spread. You can't really put the horse back in  
9 the barn here on this one. It's out. It's among the  
10 plaintiffs' counsel around the country, and we are going to  
11 see it time and again, and we are going to respond to it  
12 appropriately with the information that we have on this  
13 case.

14 So, you know, if we did not have a meeting of the  
15 minds and if I did not understand the unspoken unilateral  
16 or selective idea that Mr. Roberts had when he suggested  
17 confidentiality, which will be the first time in 30 years  
18 of practice I have ever seen confidentiality that wasn't  
19 mutual. Confidentiality means keep something quiet; keep  
20 it concealed; keep it under wraps. If one party does it  
21 and the other doesn't, it's not confidential. It's a  
22 contradiction in terms.

23 THE COURT: Mr. Ellis, by the same token,  
24 Mr. Roberts could argue that your unspoken expectation that  
25 there would either be full mutual confidentiality or no



1 confidentiality is no less --

2 MR. ELLIS: Absolutely correct, Your Honor.

3 THE COURT: -- a problem.

4 MR. ELLIS: So if we didn't have a meeting of the  
5 minds, then we don't have an agreement.

6 THE COURT: But what you said in open court is we  
7 don't care. It's at the election of the plaintiff.

8 MR. ELLIS: Confidentiality or no  
9 confidentiality, that's correct.

10 THE COURT: But that isn't what you said.

11 MR. ELLIS: I said confidentiality is at the  
12 election of the plaintiff. The Court said the same thing.  
13 I don't believe that the Court suspected at that time that  
14 one side would be able to do whatever they wanted with the  
15 material and spread it anywhere they wanted and the other  
16 side would have to stay mum.

17 MR. ROBERTS: Yes, it did. That's when the jury  
18 came in.

19 MR. ELLIS: I'm sorry. I was asking the Court  
20 what the Court perceived. If the Court perceived that this  
21 was unilateral, then I was the only idiot in the room that  
22 didn't.

23 MR. ROBERTS: When the jury returned, the jury  
24 asked the Court can we learn. The Court turned to  
25 Mr. Jeffries and asked him and him alone. Now that request

1 to Mr. Jeffries and his saying, yes, they can learn, didn't  
2 mean -- I don't think anybody in the room thought that  
3 meant everybody in the world can know everything. It was  
4 his election to let this third party know. That was the  
5 understanding.

6 And the point Mr. Ellis makes about they're not  
7 going to give me anything now, that consumed an extra 45  
8 minutes on April 19th. What I understood on April 19th  
9 what the concern was, we need to keep what we need to keep  
10 to keep state regulators happy. So they need one copy.  
11 They need to keep -- my understanding going away on April  
12 19th was they were going to keep one copy of whatever they  
13 required to keep state regulators happy; otherwise,  
14 everything would be returned to me.

15 I have not received any documents from Mr. Ellis  
16 since that day. I have returned to Mr. Ellis all documents  
17 he gave me marked confidential.

18 THE COURT: Well, it seemed to me that the  
19 authority or, well, I guess authority to determine the  
20 terms, if any, of any confidentiality agreement were vested  
21 in the plaintiff. And the reason I asked the question is  
22 it's usually the defendant who says I demand a  
23 confidentiality agreement as a part of this settlement.

24 MR. ELLIS: Which is correct.

25 THE COURT: Which you did not do.

1 MR. ELLIS: No, because we didn't particularly  
2 care whether it was confidential or not. But we're not  
3 going to be -- I don't think we should be placed in a  
4 position where we're the only ones that have to keep it  
5 confidential. The plaintiff can and has done anything it  
6 wants with the material in the file. And if it's a public  
7 document, as counsel says, until we reach this agreement, I  
8 guess I can distribute anything I want to anybody I care  
9 to.

10 MR. ROBERTS: We settled the deal on April 19th  
11 with your guarantee that it would remain confidential.  
12 That was clear.

13 MR. ELLIS: That guarantee was contingent upon it  
14 being mutual. My understanding was that it was mutual. If  
15 I misunderstood you, Mike, I'm sorry, but then we don't  
16 have an agreement.

17 THE COURT: Well, technically, I think that the  
18 language here only permits Centre, its counsel, DMS or any  
19 expert retained by Centre or its counsel to reveal  
20 confidential information in response to a subpoena seeking  
21 testimony or documents relating to the Jeffries case.  
22 Obviously, if Centre, its counsel, DMS or any experts  
23 retained by Centre or its counsel needed documents from the  
24 Jeffries case in order to respond to any information that  
25 came out in another case, Mr. Ellis wouldn't be serving the

1 subpoena on himself. So maybe that's a problem.

2 But I think, based on the record, that the  
3 plaintiff has a perfect right to say I elect unilateral  
4 confidentiality or partial confidentiality. I think the  
5 defendant makes a valid point that, if the materials that  
6 have been deemed to be confidential are legitimately at  
7 issue in another case and the defendant would be unfairly  
8 disadvantaged by not being able to produce those materials,  
9 there should be some safety valve in the settlement  
10 agreement.

11 But to say that, because Plaintiff intends to  
12 reserve to himself the right to disclose whatever he  
13 chooses in the case and not give the defendant the same  
14 option, I think is what you asked for, what you opened the  
15 door to. And you say it makes no difference, and it  
16 doesn't make any difference as long as you are able to  
17 utilize the material to the extent necessary to defend your  
18 current or future clients from any otherwise confidential  
19 material that has come into Mr. Roberts' hands as a result  
20 of this case.

21 MR. ROBERTS: I've never heard that concern  
22 articulated by Mr. Ellis, but I have offered to discuss  
23 with him adding terms to this agreement, and he's refused.  
24 I think what you're suggesting is appropriate and  
25 reasonable, and I think we would agree to it.

1 MR. ELLIS: Your Honor, this issue is not going  
2 to come up only in cases that I have with DMS. It's  
3 already coming up in a state court case in Arizona in which  
4 DMS is represented by counsel in Arizona. All of DMS's  
5 outside counsel will have the same difficulty as they're  
6 faced with information that was provided and disseminated  
7 from the Jeffries case.

8 Had there been a situation in this case where  
9 Mr. Roberts kept personnel files confidential or where he  
10 kept the information in the case confidential, as I assumed  
11 had been done, as we did with the material that we gathered  
12 on his client, we would have had no problem of a mutual  
13 confidentiality agreement. However, to make an agreement  
14 to keep mum unilaterally was never contemplated. I don't  
15 think any language that I said in there ever suggests it  
16 other than as Mr. Roberts spins it.

17 In 30 years of practice, there either is or is  
18 not confidentiality. Partial confidentiality, unilateral  
19 confidentiality is a direct contradiction in terms as I  
20 understand the word "confidential" in the English language,  
21 and we cannot agree to it. We did not agree to it.

22 THE COURT: Well, it seems to me that your  
23 argument, at least in part, is for partial confidentiality,  
24 because you're saying that the unredacted personnel files  
25 were under seal and therefore are subject to either

1 confidentiality or protection of the Court. And even if  
2 you had an agreement that there was no mutual  
3 confidentiality, I would think that those items would still  
4 remain subject to seal.

5 MR. ELLIS: Well, Your Honor, they were the  
6 subject of the Court orders. However, with complete  
7 impunity, counsel has said, too bad; I did it before the  
8 Court order, which we have no way of disproving, and  
9 therefore he uses whatever he chooses, including ones that  
10 were identified specifically by Bates numbers as being  
11 sealed. So we have no reason to believe that, even in the  
12 mutual confidentiality agreement, at this point that it  
13 would be adhered to by the plaintiff.

14 So we just don't know exactly where to go from  
15 here. We were willing on April 19th, with the assumption  
16 that the case, all the documents in it were going to be  
17 sealed, all done, everybody's confidential; it's over.  
18 That's not a problem. What Mr. Roberts proposes and the  
19 language that he proposes is a significant problem. It's a  
20 problem that I don't think we should be forced to bear, and  
21 we're going to have to do whatever is necessary not to be  
22 so handicapped as to have our information, including the  
23 financial information in the deposition of chief counsel,  
24 which, although the Court never ruled on, we did ask to be  
25 sealed and we asked Mr. Roberts to agree to be sealed. No

1 matter. It was gone, sent.

2 The simple fact is that we have no confidence  
3 whatsoever or reason to maintain confidentiality, and all  
4 of our outside counsel are going to have to deal with  
5 Jeffries documents throughout the course, because, no  
6 matter who we see or where they come from, they will say we  
7 got them before such and such an order. We know at least  
8 two counsel in Arizona who already have these depositions,  
9 at least two.

10 THE COURT: Depositions. But those were in the  
11 court record.

12 MR. ELLIS: Your Honor, everything is in the  
13 court record. All those videotapes are in the court record  
14 as well.

15 MR. ROBERTS: Not by my choice. I asked they be  
16 sealed in April.

17 MR. ELLIS: We asked that Mr. Cohen's deposition  
18 be sealed, and you didn't want to do that. We moved the  
19 Court, and the Court didn't do it.

20 MR. ROBERTS: I asked you to agree with me that  
21 everything be sealed, and you said no.

22 MR. ELLIS: I'm not going to do it unilaterally,  
23 Judge, and neither is my client. We shouldn't be forced to  
24 do so.

25 MR. ROBERTS: The evidence of that is patent.

1 When the jury came out, it was clear that one person could  
2 decide whether this person, third party, could or couldn't  
3 learn the terms. And Mr. Jeffries, consistent with the  
4 unilateral confidentiality, said, yes, they can learn.

5 MR. ELLIS: It's also consistent with mutual  
6 confidentiality that was at his election. If he elected to  
7 be not mutually, you know, quiet to a jury, then that's  
8 fine. But never did I suggest that we would keep silent  
9 while he spoke and spread whatever he wanted around the  
10 country. That's not fair. That's just not fair.

11 THE COURT: Well, I have offered you an option by  
12 which you can respond to whatever has been used from this  
13 case by Mr. Roberts in any other case, not just you, but  
14 DMS's counsel. It doesn't mention your name. It says --

15 MR. ELLIS: It mentions my name specifically,  
16 Your Honor.

17 THE COURT: It says: If Centre, its counsel, DMS  
18 or any expert retained by DMS or its counsel in the action  
19 would receive a subpoena, and "in the action" refers to  
20 some other action.

21 MR. ELLIS: It refers to the Jeffries case,  
22 Judge.

23 THE COURT: All right. Well, then you can solve  
24 that problem by adding some language that would protect  
25 your client and your client's counsel in other cases



1 elsewhere.

2 I need to do some research, but here are your two  
3 options. I would order, subject to my research as to my  
4 authority, unilateral confidentiality with the escape valve  
5 to permit DMS or Centre Life or their counsel wherever they  
6 may be litigating the opportunity to have access to what is  
7 otherwise confidential and in the possession of the  
8 defendant in our case.

9 The other option is to set the matter for trial  
10 again and charge against Centre Life the costs of the first  
11 case and probably some sanction for failing to consummate  
12 the settlement in good faith. Because I think the fact  
13 that you did not mention or reserve the right to limit the  
14 plaintiff's options to full mutual confidentiality or no  
15 confidentiality left the door open.

16 MR. ELLIS: So page seven meant nothing as far as  
17 requiring that it be mutual?

18 THE COURT: Let me look again. As far as sealing  
19 the whole record in this case?

20 MR. ELLIS: The whole record. That's the  
21 ultimate confidentiality.

22 THE COURT: It's fine with us, or returning it.  
23 It makes no difference to us. We would, of course, ask for  
24 the information Mr. Roberts found concerning us be sealed,  
25 and the same with regard to Mr. Jeffries. No problem.

1 MR. ELLIS: So there is the whole file sealed, no  
2 problem.

3 THE COURT: Whole record in this case.

4 MR. ELLIS: Whole record, no problem.

5 THE COURT: And then, when Mr. Roberts moved to  
6 do that, you resisted.

7 MR. ELLIS: Your Honor, when Mr. Roberts moved to  
8 do that, we were having difficulties with the language of  
9 the settlement the agreement. We couldn't very well.

10 MS. CALLOW: Actually, Bill, at that point we  
11 hadn't received a proposed settlement agreement, and we  
12 simply suggested to Mr. Roberts that that's part of the  
13 settlement agreement; go ahead and send it to us and that  
14 will be in there. Whatever sealing the case was going to  
15 be part of the settlement agreement, and we hadn't received  
16 a proposed settlement agreement at that point.

17 MR. ROBERTS: Your Honor, they're talking about a  
18 different issue. If you go a couple lines up as to what  
19 Mr. Ellis wants to focus on, after you asked Mr. Ellis  
20 about whether it's a confidentiality option at  
21 Mr. Jeffries' election, I then say, Your Honor, the only  
22 thing I would add as an additional issue is that there is  
23 an extraordinary amount of personal information in this  
24 record. We may come to the Court with the request that it  
25 be sealed, the actual record here, the 02-351, that it be

1 sealed. That's a different issue than Mr. Jeffries being  
2 able to share with someone at his choice, at his election,  
3 what happened, the terms of the settlement. It's an  
4 additional issue.

5 And then Mr. Ellis, there is no agreement on it.  
6 It's just: I would add that we may come to the Court with  
7 such a request to seal the record. And that's what  
8 Mr. Ellis' response was directed to.

9 THE COURT: The other problem that I see is the  
10 record in the case is not as far reaching as what would  
11 normally be the confidentiality concerns of the parties.  
12 There may be information in the hands of either side which  
13 is not yet part of the record, which was never filed with  
14 the Court, but still may have concerns about sensitive  
15 personal or corporate information. I mean --

16 MR. ELLIS: Any sensitive corporate information  
17 has already been disseminated, Your Honor, so it doesn't  
18 matter. We're already dealing with it in other cases from  
19 other lawyers.

20 MR. ROBERTS: So the record is clear, I have not  
21 given a document to anyone other than Mr. Kearney, ever.

22 MR. ELLIS: Who then gave the document to whoever  
23 he wanted and/or Mr. Jeffries. Whoever spread it around,  
24 all we know is the Jeffries documents and the Jeffries  
25 transcripts are out there.

1 MR. ROBERTS: I gave him public record documents.

2 MR. ELLIS: Well, you gave him personnel records  
3 of people from DMS.

4 MR. ROBERTS: No. I shared with him over the  
5 phone. I used one in the deposition, and then I  
6 immediately said let's redact whatever information concerns  
7 you.

8 MR. ELLIS: That's a little different, Your  
9 Honor. When we challenged the use of those, quote, what we  
10 thought were sealed documents in the Kearney case,  
11 Mr. Roberts told us he had given them to Mr. Kearney and  
12 gotten them back from Mr. Kearney, and that's why they  
13 weren't covered by the order, because he had done that  
14 before the order went on.

15 MR. ROBERTS: I had given him information.

16 MR. ELLIS: If that's the case, that, you know,  
17 as long as there's no order on, anything can go off, then  
18 we might as well get the case out in the open and let it be  
19 done, and then I'll sign any confidentiality the Court  
20 wants. But we did in good faith maintain confidentiality  
21 after April 19th. We didn't use the Jeffries material in  
22 any other case. We didn't use the information or share the  
23 information with anyone, contrary to the way we were  
24 treated by the other side.

25 Now the Court is suggesting that that is the

1 proper way to do things, that we are bound and they are  
2 not. There is nowhere in that entire transcript where it  
3 is ever suggested or stated that Mr. Roberts had the  
4 concept that only we would be bound by confidentiality; he  
5 and his other clients and Mr. Jeffries could spread  
6 whatever they wanted anywhere they wanted around the  
7 country.

8 We have now learned that that's what is going on.  
9 We have no desire whatsoever to enter into a  
10 confidentiality agreement, and I respectfully disagree with  
11 the Court that that position puts me in some kind of  
12 sanctionable position or bad faith for not going through  
13 with an agreement that we never made.

14 THE COURT: Well, there is nothing in the  
15 transcripts where Mr. Roberts said, well, if you will do  
16 that, I'll do the same; I'll hold it all in confidence.  
17 You're the one who said, more or less sua sponte, I  
18 guarantee you we will keep these matters confidential.

19 MS. CALLOW: Respectfully, Your Honor, that had  
20 to do with the videotape specifically.

21 THE COURT: I don't see that.

22 MR. ROBERTS: Multiple references.

23 MR. ELLIS: Your Honor, if you read the entire  
24 transcript, I can't tell you how many times I said there is  
25 only so much I can do today for the plaintiff to try and

1 get this resolved, but at no time in that entire record was  
2 it ever suggested, ever suggested, that this was to be  
3 unilateral. Nowhere was it every suggested it was  
4 unilateral. And in 30 years of practice, I have never seen  
5 a suggestion that there be unilateral confidentiality,  
6 because the concept doesn't make any sense.

7 THE COURT: Apparently, it does.

8 MR. ELLIS: Not to me, it doesn't.

9 MR. ROBERTS: The evidence of the disclosure to  
10 the jury directly contradicts Mr. Ellis' argument.

11 MS. CALLOW: It could also be argued that  
12 evidence of disclosure to the jury was: Is this  
13 confidential or not? No, it is not; therefore, the jury  
14 can find out.

15 MR. ELLIS: We can interpret this any way we  
16 want, but the simple fact is apparently we didn't have an  
17 agreement, and I thought that we did.

18 THE COURT: Well, that's fine if you want to try  
19 this case. You understand the peril, and you understand  
20 that the cost of the trial will be assessed -- the aborted  
21 trial would be assessed against your client, and I will  
22 consider sanctions.

23 And I'm going to look at the extent to which I  
24 have authority to simply impose what I perceive to have  
25 been the agreement between the parties. I know that I have

1 the right to interpret what's on the record, as I  
2 understand it, and impose it on the parties. I think the  
3 record is pretty clear.

4 MR. ELLIS: Can I ask the Court if at the time on  
5 April 19th this Court assumed this was going to be one way  
6 confidential?

7 THE COURT: I didn't assume either way. I  
8 thought it was entirely at Mr. Jeffries' option.

9 MR. ELLIS: As to whether or not it was  
10 confidential or as to some crafted version of  
11 confidentiality that defies the definition?

12 THE COURT: From full mutual confidentiality to  
13 no confidentiality and everything along the spectrum.

14 MR. ELLIS: Then I'm the one who misunderstood  
15 apparently, Your Honor, because I have never seen that  
16 before.

17 THE COURT: Well, I can understand what you're  
18 saying. But I also think that, if the defendant has the  
19 right to secure whatever it needs to defend itself here or  
20 elsewhere from the record in this case, that that is a fair  
21 resolution of the situation.

22 MR. ELLIS: So that we may go further, Your  
23 Honor, I'll have to discuss, obviously, with my client what  
24 election we make on this. So that I can properly discuss  
25 this with my client, my understanding is that, if the Court

1 is of a mind to order unilateral confidentiality, that only  
2 my client cannot talk about the case, that the plaintiff  
3 can spread whatever he wants anywhere he wants in the  
4 country, that only when it is used or mentioned in another  
5 case are we permitted to divulge information about the  
6 Jeffries case. Is that correct?

7 THE COURT: That's pretty much correct.

8 MR. ELLIS: And we can divulge whatever is  
9 necessary to respond to whatever is used in the Jeffries  
10 case in any other case.

11 THE COURT: Yes.

12 MR. ELLIS: All right. My understanding is  
13 further, Your Honor, that you were going to adopt the  
14 language that Mr. Roberts put in where my litigation file  
15 is given to him.

16 THE COURT: Help me out here. I didn't read it  
17 as requiring that, but show me the language.

18 MR. ELLIS: I'll be glad to help you out, Your  
19 Honor. His language specifically is at the end of the  
20 portion here that one copy only -- this is top of the page  
21 13 of 13. One copy only of all the information Centre  
22 determines is necessary for maintenance in a, quote,  
23 Jeffries claims file, end quote, shall be maintained in the  
24 possession and the control of DMS general counsel -- just  
25 as an aside, he is not the records custodian of the claims



1 file -- for as long as DMS shall serve Centre or Centre's  
2 third-party administrator. Any additional copies shall be  
3 returned to Mr. Jeffries' counsel, attorney Michael  
4 Roberts, forthwith with a sworn certification of William R.  
5 Ellis and Andrew Cohen that no additional copies of any  
6 information relating to Mr. Jeffries are maintained at the  
7 offices of Wood & Lamping, including electronically stored  
8 information, or at DMS.

9 Now that is telling me to dispose of my claims  
10 file and give it to Mr. Roberts. I wouldn't do that,  
11 Judge.

12 THE COURT: I don't read that as requiring you to  
13 give up any of your work product.

14 MR. ELLIS: Your Honor, that would be material  
15 concerning Mr. Jeffries.

16 THE COURT: Okay. Well, I think it should be  
17 modified to make clear that your work product, your  
18 personal litigation file should not be surrendered. I'm  
19 sure, I trust that Mr. Roberts did not intend that.

20 MR. ROBERTS: The language tracks what I  
21 understood the agreement to be. There was a 45-minute  
22 discussion of the concern about state regulators;  
23 otherwise, we could have everything. So it tracks that.  
24 But I was given no opportunity to dialogue with Mr. Ellis  
25 about it, because he struck the whole thing and wouldn't

1 talk to me about it. I will be happy to talk to him about  
2 that and any concerns he has.

3 THE COURT: No, I would not expect you to turn  
4 over your file to him.

5 MR. ELLIS: Well, Your Honor, I didn't expect to  
6 have unilateral confidentiality either, but I have to make  
7 sure we're on the record or very clear at this point that  
8 I'm not giving up my litigation case file nor any of my  
9 e-mails with my clients nor any of my e-mails concerning  
10 this case, nor any electronic data that I have stored on my  
11 computer, nor any of the exhibits and so forth that we  
12 generated for this case.

13 MR. ROBERTS: Are e-mails exchanged with a lawyer  
14 representing a third party something he can maintain and  
15 not provide to me?

16 THE COURT: I'm not entirely sure I follow the  
17 question.

18 MR. ROBERTS: Let's assume that Mr. Ellis has  
19 engaged in e-mail correspondence with an attorney  
20 representing Prudential Insurance Company, a different  
21 insurer. Are those things that don't need to be returned?

22 THE COURT: I think they're part of Mr. Jeffries'  
23 litigation file, his work product, and he would be --

24 MR. ROBERTS: What if they're evidence of some  
25 disclosure or breach of confidence?

1 THE COURT: Well, I don't think that's before the  
2 Court right now.

3 MR. ROBERTS: It's not right now.

4 THE COURT: It may be in some other case at some  
5 other time, but that's a different issue.

6 And I understand that there may be things in your  
7 file that can't be easily separated from your own notes and  
8 thought processes. I think there should be some agreement  
9 between the parties that you will secure the matters and  
10 the materials that you have related to this case.

11 MR. ELLIS: Your Honor, I had no problem with  
12 that on April 19th, and, if it was mutual, I would have no  
13 problem with it today.

14 THE COURT: Well, I understand your position.

15 MS. CALLOW: Your Honor, I just had one other  
16 thought based on Mr. Roberts' comments to you that I'm not  
17 sure how we take care of. But if Mr. Jeffries and  
18 Mr. Roberts can disseminate information regarding this  
19 case, but if there is an obligation on DMS not to  
20 disseminate that information and information is in fact  
21 disseminated, for example, through other clients that the  
22 Jeffries themselves did not authorize or disseminate, but  
23 then it's charged back that possibly DMS disseminated it,  
24 how do we handle that in the settlement agreement? Because  
25 I don't think that's addressed here.

1           For example, third party dissemination,  
2   Mr. Roberts has stated that, if a document is out there,  
3   it's public record; it's in the public. DMS obviously  
4   can't disseminate, but anybody else can once it's out  
5   there. There are concerns that, if Mr. Roberts is making  
6   accusations that we have already disseminated information,  
7   which we haven't, that that might be an ongoing problem.

8           MR. ROBERTS: I would reassert my request that  
9   the record be sealed right now, ask you to agree to that.  
10   And as far as the other issue goes, it's an evidentiary  
11   issue. You think I have breached the agreement; I think  
12   you have. It's an evidentiary issue about where the  
13   document came from.

14          THE COURT: I tend to agree. My crystal ball is  
15   foggy this morning, and I don't know what's going to happen  
16   in other cases in other jurisdictions.

17          MS. CALLOW: Right. Which is why I think we all  
18   wanted a resolution to end this case. And it sounds like  
19   what we're going down is the path of more litigation.

20          MR. ROBERTS: Let's seal the record right now.

21          MR. ELLIS: As soon we have an agreement, Your  
22   Honor, I think we can do that.

23          THE COURT: All right. Well, as I said, I'm  
24   going to review my options. If you want to submit some  
25   briefs on that point, you can.

1 MR. ELLIS: Thank you, Judge. I think we will.

2 THE COURT: As I said, what I'm contemplating is,  
3 if I don't have the authority for some reason, after I have  
4 given this some more thought and better research, then the  
5 only other option is to set it for trial again and assess  
6 the costs against one side or the other. And I can tell  
7 you now it would be the defense. And there may be  
8 sanctions, and I'm thinking of sanctions in the nature of  
9 ten percent interest on the unpaid settlement amount for  
10 the period during which no settlement agreement language  
11 was agreed between the parties, and that will be a  
12 substantial amount, ten percent for six months on two  
13 million dollars.

14 MR. ELLIS: Well, let's consider a couple things  
15 there, Your Honor. First of all, obviously, that sanction  
16 will be improper if a defense verdict is rendered in the  
17 case ultimately.

18 THE COURT: Not necessarily.

19 MR. ELLIS: Okay. Secondly, the reason that it  
20 has taken six months, if the Court follows the time line  
21 that we presented with regard to the settlement agreement,  
22 there has not been delay on the part of DMS in trying to  
23 get this resolved. We waited a month for the first draft.  
24 We sent back interlineages 12 days after Mr. Jeffries had  
25 made an election as to how he wanted the money, and then we

1 waited two-and-a-half months for a return from Mr. Roberts  
2 as to what he didn't like about what we had sent him, if  
3 anything. So the delay was not on our part. We responded  
4 promptly and as quickly as possible each time. Mr. Roberts  
5 begins his letter saying it's been six months. What he  
6 doesn't say is that we responded promptly every time we got  
7 a draft.

8 THE COURT: Well, think about that as a starting  
9 point, and then we'll talk about it.

10 MR. ELLIS: I understand Your Honor wants this to  
11 be resolved.

12 THE COURT: I do.

13 MR. ELLIS: I think we would like to see this  
14 resolved as well.

15 For the record, Your Honor, I think that the  
16 imposition of costs and sanctions, because apparently the  
17 Court thinks I'm the only one that misunderstood what was  
18 being said about confidentiality, I think is obviously a  
19 matter my client's going to have to consider but strikes me  
20 personally as being somewhat unfair.

21 THE COURT: Well, let me just tell you why I'm  
22 thinking that, preliminary thoughts on that subject. I  
23 look the at proposed settlement agreement. I see  
24 substantial amounts of red lining with no apparent  
25 explanation of why, and, unless I'm missing the point here,

1 I'm hearing, I believe, from the plaintiff that there was  
2 no explanation forthcoming of why this was all red lined.  
3 And things simply drifted after that. And there was  
4 ambiguous but apparently peremptory language from the  
5 defense that said this is the final version, which has a  
6 sort of take-it-or-leave tone to it, to my ear. Now, maybe  
7 that is not what was intended, but that's the way I have a  
8 tendency to hear it.

9 When somebody tells me this is the final version,  
10 that sounds to me this is our final offer. Take it or  
11 leave it. And if you don't respond and soften that  
12 position and engage in dialogue, then that seems to  
13 reinforce that impression.

14 MR. ELLIS: Your Honor, I don't know when I  
15 didn't respond to Mr. Roberts. In fact, subsequent to  
16 that, quote, final version, there is an e-mail in which he  
17 said I'm glad to see that we can still work on the tax  
18 issue. And with regard to the confidentiality, I expressed  
19 to him a number of times our concerns with the unilateral  
20 nature of it. Mr. Cohen expressed to him in his voice mail  
21 and e-mail that he has concerns about unilateral  
22 confidentiality because he never heard of it. If you read  
23 Mr. Cohen's voice mail, he says that's something that, you  
24 know, we have to talk about.

25 MR. ROBERTS: The voice mail predated by two or

1 three months the e-mail from Mr. Ellis which said this is  
2 the final version.

3 MR. ELLIS: In any event, I had discussed with  
4 Mike, he wanted to know about the reasons for the  
5 interlineages. I told him what we could not do, for  
6 example, on the tax issue. I told him in our telephone  
7 discussions that we could not sign off and say that  
8 Mr. Jeffries paid for his premiums with post-tax dollars.  
9 We don't know that. We didn't know that for a fact. Mike  
10 said, well, you investigated it for four months. But we  
11 didn't get the information from the bank, no matter how  
12 hard we tried, to confirm it one way or in other. And we  
13 can't take a position that we can't back up should we ever  
14 be questioned about it. So, I said you're asking us to say  
15 more than we can say. It's that simple.

16 Mr. Cohen and his financial advisor are hopefully  
17 working out language that will satisfy her concerns about  
18 taxes and not make us extend and say something we can't  
19 say. Same thing with all the confidentiality provisions,  
20 they have been overreaching, as is this one demanding my  
21 file. And, you know, and the unilateral nature of it just  
22 frankly threw me for a loop. I have never heard of such a  
23 thing where one side can say anything to anybody in the  
24 country they want and the other said remains mute. It  
25 doesn't even fit within the definition of the word



1 "confidential." Confidential by it's own definition  
2 requires that nobody says anything. Now, if I'm using the  
3 wrong language here, I guess that's my fault, but that's  
4 what that word has always meant to me.

5 And I will be happy to brief the issue for the  
6 Court. I don't think there is a case in the country where  
7 unilateral confidentiality has ever been expressed, adopted  
8 ordered or even agreed to, because I think the terms are  
9 mutually exclusive.

10 THE COURT: Well, I respectfully disagree, but  
11 let's have a schedule on this. I think blind briefs two  
12 weeks, and I'll just rule. I'll issue my order, and that  
13 will be it.

14 MR. ELLIS: In the meantime, I should discuss  
15 with my client whether they want to go forward. Well, we  
16 don't know actually how to make that decision yet, because  
17 we don't know what the Court's going to rule.

18 THE COURT: 10/22, close of business.

19 MR. ROBERTS: That's fine, Your Honor.

20 MR. ELLIS: Close of business is five o'clock,  
21 Your Honor?

22 THE COURT: Yes. Close of our physical, not  
23 electronic, doors.

24 MR. ELLIS: Well, I asked for a specific reason,  
25 Your Honor.

1 THE COURT: I know, I know. It lost it's meaning  
2 in the new world order. If you can resolve this between  
3 the two of you or between yourselves and Mr. Cohen and the  
4 financial person between now and then and save yourselves  
5 time and effort, that's fine. Otherwise, I'm going to do  
6 something autocratic about it.

7 MR. ELLIS: Yes, ma'am.

8 THE COURT: You put me in the position where I  
9 have to.

10 MR. ELLIS: Your Honor, believe me, I didn't want  
11 the Court in this position, nor did I ever dream that this  
12 was a potential. But I don't know what to do when someone  
13 can use whatever he chooses to use in any other case,  
14 whether it's sealed, confidential or otherwise and then  
15 expect us to remain mute about it.

16 THE COURT: Well --

17 MR. ELLIS: It's a difficult situation for my  
18 client to be in.

19 THE COURT: Maybe you can narrow the  
20 confidentiality by agreement to Mr. Jeffries personal  
21 information, medical information, whatever.

22 MR. ROBERTS: I have offered to talk about --

23 MR. ELLIS: Your Honor, I never would disseminate  
24 medical information in any event. It would be a violation.

25 MR. ROBERTS: I have offered to talk about mutual

1 confidentiality since I got the final version. It's gone  
2 nowhere.

3 THE COURT: I can't help but think, with two  
4 brilliant legal minds on both sides that you can't  
5 fabricate.

6 MR. ROBERTS: I only have one on my side.

7 THE COURT: They have two.

8 MR. ELLIS: They have --

9 MR. ROBERTS: They have two.

10 THE COURT: Construct a resolution of this  
11 problem. It's not insoluble.

12 MR. ELLIS: We have to make the effort, Your  
13 Honor.

14 THE COURT: Well, why don't you do it? You can  
15 make it as detailed, as fine tuned, as unique, as you  
16 choose. You can do that by agreement, and, unless it's the  
17 most peculiar arrangement I have ever seen, I'm sure, I  
18 will adopt it and sign off on it.

19 MR. ELLIS: Do I understand from the current  
20 status of things, Your Honor, so that I know if other  
21 information is divulged, that, as of now there is no  
22 confidentiality agreement until we come to one, and that,  
23 whatever is divulged at this point to whatever lawyers  
24 around the country is tough luck?

25 MR. ROBERTS: No. I'll represent this, that we

1 settled the case on April 19h based on a representation  
2 that you would maintain confidence from that moment  
3 forward. And I expect that to continue.

4 MR. ELLIS: I settled it with the same  
5 expectation that you would be confidential.

6 MR. ROBERTS: Well, you told me on the record  
7 that you would guarantee from that day forward it would be  
8 confidential, not just the videotapes, everything. I  
9 wasn't just concerned about the videotapes.

10 I will represent that I have shared information  
11 with Mr. Kearney, and that's it. I haven't given documents  
12 to anybody, and I don't intend to.

13 MR. ELLIS: In which case Mr. Kearney is very  
14 well connected with plaintiffs' counsel around the country.

15 MR. ROBERTS: Mr. Kearney is not the only  
16 individual. First of all, that lawyer from Arizona you saw  
17 has collected documents from many cases from many  
18 jurisdictions. He's done research. Mr. Kearney isn't the  
19 only person that had access to that. The entire world has  
20 access to the record right now.

21 I again ask you, let's seal it.

22 MR. ELLIS: I'm sorry. I thought you told me  
23 that you spoke with Mr. Kearney about it on the phone but  
24 didn't give it to him. Now, you're telling me Mr. Kearney  
25 got it and sent it.

1 THE COURT: You're homogenizing the arguments  
2 over the personnel files and the depositions, and I  
3 understand the distinction, and I don't know that it's  
4 fruitful to revisit it for the fourth or so time. But I  
5 expect the defendant to hold the information that it's  
6 acquired during the course of this case confidential.  
7 Plaintiff has essentially recommended sort of a status quo  
8 for at least the next couple of weeks. Is that a fair  
9 statement?

10 MR. ROBERTS: We can maintain everything in  
11 confidence for the next -- until further order of the Court  
12 or further instruction from the Court.

13 THE COURT: All right.

14 MR. ELLIS: Can we have the same agreement that  
15 counsel will advise Mr. Kearney to do the same with regard  
16 to the Jeffries material? It's his client.

17 MR. ROBERTS: I will instruct Mr. Kearney to not  
18 share any Jeffries information with anyone.

19 THE COURT: Okay.


20 MR. ELLIS: That will do for the moment, Your  
21 Honor.

22 THE COURT: All right. Thank you.

23 CONFERENCE CONCLUDED AT 10:35 A.M.  
24  
25

C E R T I F I C A T E

I, Betty J. Schwab, the undersigned, do  
hereby certify that the foregoing is a correct  
transcript from the record of the proceedings in  
the above-entitled matter.

  
BETTY J. SCHWAB, RPR  
Official Reporter